IN THE

Supreme Court of the United States

October Term, 1948.

No. 291 MISC.

JOHN K. AIRD,
Petitioner,

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

THOMAS E. BYRNE, JR.,
Counsel for Respondent.

TIMOTHY J. MAHONEY, JR.,
MARK D. ALSPACH,
KRUSEN, EVANS AND SHAW,
Of Counsel.

International, 311 Chestnut St., Phila. 6, Pa.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

For the most part we accept the statement of the case which is contained in the Petition. It will, however, be necessary for us to restate certain portions where our statement would differ substantially from that of Petitioner and to state other portions which have been touched but lightly by the Petitioner.

The original libel alleges that the Petitioner was discharged from the service of the Steamship "Walt Whitman" by its Master on August 12th, 1942 (paragraph 6). It is further averred (paragraph 9) that the Libellant was compelled to leave the vessel at New York. Petitioner places considerable emphasis upon the circumstances un-

der which he became a member of the crew of the ship at Portland, Oregon. That was in May, 1942 but the cause of action here did not arise until August, 1942. For that reason we think a somewhat fuller statement of the events which transpired in August, when the Petitioner was discharged from the vessel and the cause of action arose, is indicated.

The "Walt Whitman" sailed from Portland, Oregon in May of 1942 and on August 12th arrived at the Army Base at Brooklyn, New York. The vessel was owned by the United States and called at the Army Base because it had been assigned for service to the Army and was to carry Army cargo to the European Theater of War.

Shortly after the arrival of the vessel at the Army Base at Brooklyn, the Master, Captain Carlson, was requested to produce the Crew List at the Office of the Provost Marshal. The Master sent the Chief Officer to the Provost Marshal's Office with the Crew List (102a). Very shortly thereafter the Master received a written order reading as follows:

"NEW YORK PORT OF EMBARKATION

OFFICE OF SUPERINTENDENT
Army Transport Service
1st Ave. and 58th Street

BROOKLYN, N. Y.
August 12, 1942

SUBJECT: John K. Aird (E-217903 and B-87662)

To: Captain O. H. Carlson, Master of the S. S. WALT WHITMAN

1. By order of the Superintendent, Army Transport Service, the Subject is to be immediately separated from employment, reason being given, "Services no longer desired".

2. Subject will be picked up by the Master-at-Arms and kept under strict surveillance while he is collecting his effects and being paid off. He will be detained until a guard arrives to escort him out of the Port.

For the Superintendent:

/s/ HAROLD T. LOWE
Harold T. Lowe
Lt. Col., Q. M. C.
Intelligence Officer, A. T. S.

This order has been sent to the operators."

The above order was brought to the vessel by a Captain or a Lieutenant of the United States Army (104a) who was accompanied by another man in uniform (16a). The Army Officer complied with the terms of the order and neither the Captain of the vessel nor anyone else aboard took any steps independently of the order except that on the following day the Captain paid Petitioner his earned wages in the office of the Shipping Commissioner in New York.

After the Petitioner left the vessel he made no efforts at the Army Base to learn the cause of his removal and at no time after he had been paid his wages did he communicate in any way with the Respondent herein until he commenced suit in February of 1943. He did, however, communicate with various Governmental Agencies as will appear by correspondence in the Record (118a, 119a, 21a, 22a, 24a, 25a, 26a, 28a and other correspondence not of record).

We direct the attention of the Court to the fact that the order signed by Lieutenant Colonel Lowe was addressed to Captain Carlson. The following communication was sent by the same Officer to the Respondent:

"NEW YORK PORT OF EMBARKATION
OFFICE OF SUPERINTENDENT
Army Transport Service
1st Ave. and 58th Street

BROOKLYN, N. Y.
August 12, 1942

Weyerhaeuser S. S. Lines
21 State Street
New York, N. Y.

Att'n: Capt. Dantzler

Gentlemen:

Confirming telephone conversation, John K. Aird, radio operator aboard the S. S. WALT WHITMAN, has been removed from the ship. His services are not desired by the Army Transport Service.

Yours truly,

/s/ HAROLD T. LOWE
Harold T. Lowe
Lt. Col., Q. M. C.
Intelligence Officer, A. T. S.

Captain O. H. Carlson has been notified of the above action."

The Respondent here was not the owner of the vessel but rather acted as agent for the United States under the provisions of the familiar GAA 4-4-42, 7 Fed. Reg. 7561; Title 46 Code of Fed. Regs., 1943 Cum. Supp., p. 11427, § 306.44. As the Court below points out, the fact that the vessel was owned by the United States clearly appeared upon the face of the Shipping Articles and although this Respondent was therein described as charterer rather than as agent, the record is clear that this was an error on the part of the Shipping Commissioner who had prepared the Articles. This Court is already familiar with the problems posed by this Agreement. *Hust v. Moore-McCormack*

Lines, Inc., 328 U. S. 707; *Caldarola v. Eckert*, 332 U. S. 155; *Cosmopolitan Shipping Company, Inc. v. McAllister No. 351; Fink v. Shepard Steamship Company, No. 360; Gaynor v. Agwilines, Inc., No. 430; Weade v. Dichmann, Wright & Pugh, Inc., No. 179*, argued February 1st and 2nd, this term.

The District Court dismissed the libel and the Court of Appeals affirmed. As a practical matter the present case is largely academic. As will appear by a letter from the United States Maritime Commission to Petitioner, printed as an Appendix to this brief, Petitioner's claim for loss of wages between the time of his removal from the "Walt Whitman" and the time he obtained similar employment on a privately owned vessel in December of 1942 has been allowed by the Maritime Commission and a voucher issued in the sum of $677.79. Whether the Petitioner has accepted that sum is not known to counsel for Respondent at the time of preparing this brief.

ARGUMENT.

The Petitioner in the present suit is really attempting to recover from the Respondent, which acted as General Agent for the United States, the amount of his wages from the time he was removed from the "Walt Whitman" by the Army until the time he obtained similar employment on another vessel even though the Petitioner was employed by the United States, the vessel was owned by the United States and he was discharged from employment pursuant to an order issued under the authority of the United States by one of its Army Officers.

The Petition sets out what it refers to as six reasons why the writ should be allowed in this case. Petitioner states, first, that the decision of the Court below is in conflict with the decision of this Court in *Hust v. Moore-McCormack Lines, supra.* That is not so. *Hust* involved a suit for personal injuries under the Jones Act. There is no claim for personal injury here; it is a simple claim for wages under a contract. Petitioner states that the Court of Appeals held that the decision in the *Hust* Case was overruled by the later decision of this Court in *Caldarola v. Eckert, supra.* That is a misstatement. Judge Biggs, concurring, said that he was forced to the conclusion that the decision in *Caldarola* overruled or at least limited the doctrine of the *Hust* Case to such a degree that nothing now remains upon which *Aird's* Case may properly be bottomed. The Opinion of the Court, however, said that in the *Hust* Case the Supreme Court "had no occasion to consider whether such an agent as Weyerhaeuser could be personally bound as employer of seamen whom it might procure for employment by a disclosed principal. Obviously the latter problem involves wholly different legal questions". 169 F. (2) 606 at 611.

Petitioner's second alleged reason for allowance of the writ is the assertion that the decision of the Court of Ap-

peals makes a distinction between the remedy under the Jones Act and the other remedies of the seamen. That is not so. The decision of the Court of Appeals is based upon the clearest logic. Aird was employed by the Government and discharged by the Government. The Court of Appeals indicated that his remedy would therefore be against the Government and not against the Respondent which acted as the disclosed principal for the Government. The Court of Appeals had no occasion to and did not pass upon any right under the Jones Act, any right to recover by reason of personal injury due to unseaworthiness or any other question which was not involved in the rather simple facts of the case at bar.

Petitioner's third reason asserts that the decision of the Court below is in conflict with the decision of the Court of Appeals for the Second Circuit in *McAllister v. Cosmopolitan Shipping Company.* His fourth, fifth and sixth reasons allege conflict with other cases, some of which are now pending before this Court. Any conflict or alleged conflict will be resolved by the decision of this Court in those cases. We will not affect learning and argue them here.

To argue the present petition in extenso would involve a repetition of the material which is already before the Court in the *McAllister* and related cases referred to above. The decision of the Court of Appeals in this case is in accord with the decision of the Court of Appeals for the Second Circuit in *Shilman v. United States,* 164 F. (2nd) 649, cert. den. 333 U. S. 837. The *Shilman* Case involved a seaman's claim for wages which were wrongfully withheld. He sued the United States and the General Agent. The Court of Appeals held the Government liable but affirmed the dismissal as to the agent, *73 F. Supp. 648.* This Court denied certiorari. The very fact that the Second Circuit dismissed the contention that the agent was liable in such summary fashion in the *Shilman* decision is indicative of the fact that the problem presents simple legal principles and the argu-

ment that the agent should be liable under the facts in the case at bar is completely lacking in merit. The *Shilman* Case is the complete answer to the Petitioner's contention in his third point that there is a conflict between the decision of the Court of Appeals for the Third Circuit in the case at bar and the decision in the *McAllister* Case. The same Judge wrote the Opinions in *Shilman* and *McAllister*. His reasoning in both Opinions clearly illustrates the fallacy in the Petitioner's position.

It has not previously been suggested that liability for a seaman's wages rests upon a ship's husband. The statutes all refer to the right of a seaman to recover his wages from the Master or owner, 46 U. S. C. A. 592, 594, 596 and 599.

In the case at bar it is not even controverted that the United States owned the "Walt Whitman". The only evidence in the Record connecting the Respondent with the vessel at all is the GAA 4-4-42 Agreement. While the Respondent may have procured Petitioner for employment by the ship's Master pursuant to its obligation under the Agency Agreement, this is the clearest possible case where the Master (the United States) and not the Agent (this Respondent) was responsible for the operative facts which gave rise to the alleged cause of action. The whole course of events illustrates that—down to and including the offer of the Maritime Commission to reimburse the Petitioner for the loss of wages he suffered after he was removed from the "Walt Whitman". Clearly the Respondent here did not remove Aird or cause him to be removed. The communications show that the Petitioner had already been removed from the vessel by the United States Army when the communication addressed to this Respondent was written.

The present case does not present broader issues involved in claims for injury, maintenance and cure which are all before this Court in the *McAllister, Weade, Fink* and *Gaynor* Cases. Here is a case where the operative facts

clearly show that they were the acts of the Master, not the Agent nor the Captain or members of the crew of the vessel. Every case cited in the Petition and supporting brief involves an injury situation. Only the *Shilman* decision cited in our brief is even close to the facts in the present case.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is right. The Petition for certiorari should be denied.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Respondent.

TIMOTHY J. MAHONEY, JR.,
MARK D. ALSPACH,
KRUSEN, EVANS AND SHAW,
Of Counsel.

APPENDIX.

UNITED STATES MARITIME COMMISSION
Washington

October 11, 1948

Mr. John K. Aird
Radio Operator
SS. JAMES ROY WELLS
c/o American Foreign Steamship Co.
80 Broad Street
New York 4, N. Y.

Dear Sir:

SS. WALT WHITMAN—Voyage #1

Reference is made to your correspondence with the War Shipping Administration concerning your summary removal by the Army Transport Service on August 12, 1942, from the SS. WALT WHITMAN, a vessel owned and operated by the War Shipping Administration, but assigned to the Army for the voyage involved.

Investigation indicates that although you were in fact an unclassified civil service employee of the War Shipping Administration and not of the Army, you were removed by the latter in purported compliance with the policy enunciated in Section 6 of Title 1 of the Act of June 28, 1940, c. 440, 54 Stat. 679. It further appears that while you could not be reinstated because your ship had sailed, you were subsequently cleared for employment by the Government and thereafter you sailed on December 4, 1942, on the SS. SOUTHERN SUN, a privately operated vessel.

In these circumstances it appears that you were entitled to pay as an employee of the War Shipping Administration for the period during which you were ashore, plus return transportation, including subsistence at the rate of $4.00 per day, from New York, New York, to Portland,

Oregon, the port from which you originally shipped, less your earnings while ashore. You are, of course, not entitled to area or attack bonuses since you were not, while ashore, exposed to the perils for which such bonuses were paid. As it appears that you earned $132.87 during your service ashore, your claim may be allowed for $677.79. There is accordingly enclosed a public voucher in the amount of $677.79 computed as follows:

Wages from August 13 to December 3, 1948, both inclusive, or 3 months, 21 days @ $172.50 per month	$638.25
Less earnings while ashore	132.87
	$505.38
Transportation from New York to Portland, Oregon	152.41
Subsistence 5 days @ $4.00 per day	20.00
	$677.79

If you will sign the voucher on the line marked "Payee" where your initials appear and return it to the Commission at Washington, D. C., attention of the writer, it will be put in line for immediate payment.

This payment is without prejudice to your claim against the Weyerhaeuser Steamship Company, the agent of the Government, in connection with your removal from the vessel.

Very truly yours,

J. Hollis Orcutt
J. Hollis Orcutt
Assistant Chief
Bureau of Liquidation